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In the Supreme Court of the United States

October Term A.D. 1940

No.

NORTHWESTERN BREWERS SUPPLY COMPANY, and STURDY-BILT EQUIPMENT CORPORATION,

Petitioners,

vs.

WILLIAM J. SCHMIT, Trustee,

Respondent.

In the Matter of DELTA BREWING COMPANY, a Corporation,

Bankrupt.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To *The Honorable,* the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Sixth Circuit in the above case.

SUMMARY STATEMENT OF MATTER INVOLVED

The Delta Brewing Company went into reorganization proceedings under Chapter X of the Chandler Act in October, 1939 (R. 124). The appellants filed as secured creditors in said proceedings, the Northwestern Brewers Supply Company having a Conditional Sales Contract on a labeling machine and the Sturdy-Bilt Equipment Corporation having a Chattel Mortgage on a bottle washing machine (R. 1, 6).

In both claims appeared express reservations of "all rights and security" afforded by the respective Conditional Sales Contract and Chattel Mortgage, coupled with an express denial that "by filing this claim" were there waivers of the same. (R. 5-7).

The reorganization failed. The Court adjudicated the debtor bankrupt on February 21, 1940, providing in its order that claims filed, together with objections, be referred to the Referee in Bankruptcy and that claims filed in the reorganization proceedings be considered filed in the bankruptcy proceedings (R. 18). No objections have been made to appellants' claims as proper secured claims. They were recognized as such throughout the proceedings (R. 29, 31, 34, 36, 38 and 89). No issue has been raised in that regard.

Upon the adjudication of bankruptcy, the reorganization receiver petitioned to permit trustee to sell all assets free and clear or in whatever way deemed best (R. 19). On March 12, 1940, the Trustee in Bankruptcy was appointed (R. 23, 25). An effort was made on that day to obtain adequate bids on public sale. The bankrupt's assets were offered in various ways, including free and clear of various liens. The appellants promptly objected

unless the Trustee could show that an amount could be obtained in excess of the liens (R. 23). Formal objections followed (R. 51, 106). Further objections were made in open Court (R. 55), the real estate mortgagees objecting similarly. Acknowledged encumbrances on the property were:

Real Estate Mortgage, including interest (R. 22)	$50,031.00
Northwestern Brewers Supply Company, with interest from July 9, 1938 (R. 4)	1,400.00
Sturdy-Bilt Equipment Corporation, with interest (R. 6)	2,018.00
Klein Filter & Mfg. Company (R. 29)	1,000.00
TOTAL	$54,449.00
Real Estate Taxes (R. 44, 90)	8,812.40
TOTAL	$63,261.40
Net operating loss during reorganization (R. 93)	8,003.60
Unpaid Trustee's notes, plus interest (R. 93)	5,000.00
Petition for allowance of expenses by reorganization trustee (R. 93)	1,578.66
Fees of reorganization trustee (R. 93)	2,000.00
Petition for attorney's fees (R. 93)	229.02
Fees of reorganization Referee in Bankruptcy (R. 93)	532.00
Attorneys' fees for Rushton (R. 94)	350.00
Estimate of administration expenses in bankruptcy proper (R. 90)	3,000.00
Total Expenses	$20,693.28
GRAND TOTAL	$83,954.68

The property (R. 72) was appraised at $65,929.27; separate appraisal on appellants' machinery was as follows (R. 73-74): Northwestern Brewers Supply Company, $1488.00; Sturdy-Bilt Equipment Corporation, $1855.00. The land and buildings were appraised at (R. 72) $35,500.00.

The sale was adjourned to March 27, 1940. No adequate bid was made. A bid for $26,800.00, free of liens, was not accepted (R. 40-41).

The sale was adjourned to April 2nd, 1940. The bid of $26,800.00 was not accepted. The Referee declared the bids inadequate (R. 63) and directed private sale. Bidders present asked for further notice before any sale was made, so that they could meet any bid (R. 63). No further notice was given. Instead, on April 11, the *Trustee privately accepted the inadequate bid of $26,800.00* in two parcels: (1) $3800.00 for unencumbered personalty, except $171.00 due on a truck; and (2) $23,000.00 for all encumbered property, including real estate and appellants property, free of liens (R. 69, 71, 92).

The only notice that appellants had of acceptance of this bid was a letter sent by Referee on April 12th. The sale was confirmed on April 11, 1940 (R. 92).

The sale was made for the avowed purpose of paying administration expenses and losses. There were no other assets. (R. 90, 92, 93, 94, 107). The record fails to show notice to the lien holders of authority to borrow money in reorganization.

The lower court rendered its opinion upon petitions for review on May 28, 1940, and an order was entered on the same day confirming the Referee's sale (R. 110, 111). Appellants' appeal to the Circuit Court of Appeals followed where the lower court was affirmed.

JURISDICTION

On January 14, 1941, the Circuit Court of Appeals entered its decision sustaining the lower court on the ground that "in the absence of a petition for reclamation or the filing of a claim for priority as secured creditors there was no error" (R. 135). Petition for rehearing was denied on February 12, 1941. This petition for Writ of Certiorari has followed. Stay of Mandate was granted March 4, 1941.

The issues here presented arise in bankruptcy proceedings pending in the United States District Court for the Western District of Michigan, Northern Division, and the jurisdiction of this Court is invoked under the Bankruptcy Act, Sec. 24c, 11 U.S.C.A. 47(c) and the Judicial Code, Sec. 240, 28 U.S.C.A. 347(a) relating to the issuance of Writs of Certiorari in bankruptcy proceedings and civil cases.

QUESTIONS PRESENTED

I.

Does the Bankruptcy Act as amended require a secured creditor to file a claim for priority or for reclamation in addition to a secured claim before the date of sale of assets in the hands of the Trustee?

II.

Will the Trustee in Bankruptcy be permitted to sell in bulk commingled real and personal property constituting the bankrupt's estate, free and clear of uncontested liens for which secured claims have been filed where the purchase price is insufficient to satisfy the lien claims and where no proportionate payment has been or could be determined?

III.

Does a creditor who has filed an uncontested secured claim waive such security so as to subordinate the right of the claimant in the proceeds to the expenses of administration, or is he estopped from claiming his security by consenting to proceedings under Chapter X of the Bankruptcy Act and permitting Trustee to remain in possession of assets claimed as security?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals which this Court asked to review (1) is in conflict with decisions of other Circuit Courts of Appeal, (2) is in probable conflict with its own decisions, or (3) resolves a question which may be unsettled by reason of the enactment of the Chandler Act in a fashion contrary to the effect and purpose of decisions of parallel courts prior to the passage of the amended bankruptcy act.

The decision of the Circuit Court of Appeals is brief and without citation of authority affirms the order of the District Court confirming a sale of a Trustee in Bankruptcy over the objection of appellants, claimants holding security instruments, because the appellants had not filed claims for "priority as secured creditors" or reclamation proceedings before the date of sale. The decision questioned for the first time in the case the procedure of the appellants in filing their secured claims. At no time has the validity of the lien been challenged. Until this decision, the questions presented were those identified above as II and III. Since these questions are essential to a complete determination of whether the Trustee's sale shall be confirmed, we believe they properly should be presented to the Court at this time.

I.

The holding of the Circuit Court of Appeals for the Sixth Circuit in this case, requiring a secured claimant to file a claim for priority or a petition for reclamation in addition to a secured claim is contrary to the holding of this Court and other Circuits in the following respects:

(a) No claim for priority or reclamation is required;

(b) The decision is unsupported by the Bankruptcy Act.

The respective claims of the appellants, which were denominated and filed as secured claims, set forth that "claimant reserves all rights and security afforded by said contract or otherwise and does not, by filing this claim, waive the same." (R. 5, 7) The claims have at no time been attacked either as to their fundamental nature as secured or upon a procedural basis.

Contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit Court in the instant case, no claim for priority is required under decisions of the various circuits as indicated in the cases cited in the footnotes hereto. Neither liens nor claimants thereon are affected by the priority provisions of the Bankruptcy Act as amended.[1]

A clear distinction has at all times been drawn between priority and secured claims. The rights of lienors under the state law are unimpaired in bankruptcy.[2] The great majority of the holdings, including the decisions of this Court, lay down the rule that, unless there is a definite

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[1]City of Dallas, et al vs. Ryan, et al (C. C. A. 5) 62 F. (2nd) 959; certiorari denied 289 U. S. 742; In re Joaquin Valley Packing Co., 295 F. 311; certiorari denied 265 U. S. 583.

[2]In re Lake's Laundry Inc. (C. C. A. 2) 79 F. (2nd) 326; certiorari denied 296 U. S. 622.

abandonment proved, no claim need be filed by the holders of security and the trustee gets no better title than the bankrupt had.[3]

A secured creditor, as defined in the Bankruptcy Act, Sec. 1(28), may have a claim allowed for the surplus over the value of the security as provided in Sec. 57(e) of the Act. Sec. 63, relating to debts which may be proved, does not refer to secured creditors. The decision of the Circuit Court of Appeals would necessitate the filing of a claim for priority, but Section 64 of the Bankruptcy Act dealing with priorities is not concerned with secured creditors. Before the enactment of the Chandler Act it was held that sections respecting the filing of claims referred to unsecured claims and Section 67(d) of the act expressly excepted liens given or accepted in good faith.[4] Section 67(d) is amended by the Chandler Act, but this does not appear to have altered the status of a person holding a valid secured claim.

The Circuit Court, whose decree this Court is asked to review apparently ignores its decision of *In re Voight-Pros't Brewing Co.,* 115 F. (2d) 733 decided Nov. 15, 1940, three other judges sitting, arising under § 77B. This case holds that property, title to which is retained under a conditional sales contract is not subject to reorganization proceedings.

The decision of the Circuit Court of Appeals in the instant case, therefore, in requiring the filing of a priority claim or reclamation proceedings prior to the sale by the Trustee, injects into the Bankruptcy Act a novelty unsupported by previous decisions and in conflict with them, unless the intervention of reorganization proceedings under Chapter X of the Bankruptcy Act has altered the basic conception of lien rights.

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[3]Yeatman vs. New Orleans Savings Institute, 95 U. S. 764; 24 L. Ed. 589. In re Cherokee Pub. Service Co. (C. C. A. 8) 94 F. (2nd) 53.

[4]Courtney vs. Fidelity Trust Co. (C. C. A. 6) 219 F. 57.

II.

The order of the Circuit Court of Appeals for the Sixth Circuit in this case, confirming the affirmance of an order for the sale by the Trustee, is contrary to the holding of this Court and other Circuits in the following respects:

(a) Courts of equity will not order a sale free and clear from liens where the purchase price is insufficient to pay off lien claimants.

(b) The sale would result in a violation of the constitutional protection afforded by the Fifth and Fourteenth Amendments to the Constitution.

Unchallenged liens, together with real estate taxes, totaled $63,261.40. This property was ordered sold for the sum of $26,800.00, free and clear of the liens. The record is barren of any indication of how the proceeds of the sale are to be used other than that it is intended to be applied to taxes and expenses of administration. (R. 67 Trustee's Petition for Confirmation) The estimated loss of operation in reorganization, together with fees therein and administration expenses in the bankruptcy after adjudication, total approximately $20,000.00.

The rule laid down by this Court has been that the equity power to order a sale of a bankrupt's property free from liens and encumbrances will not be exercised "if it appears that the amount of the encumbrances exceeds the value of the property".[5] The right to retain a valid lien until the debt secured thereby is paid is a substantial property right which may not be taken from the creditor consistently with the Fifth and Fourteenth

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[5]Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555; 79 L. Ed. 1593; 97 A. L. R. 1106.

Amendments to the Constitution of the United States.[6] A Trustee in Bankruptcy may not override valid liens.[7]

The confirmation of a sale such as that existing in this case would leave the lower court with the impossible task of attempting to determine the proceeds of the various securities in the composite price. The Trustee cannot distribute the proceeds for unauthorized loans or disbursements of the reorganization receiver or for administration expenses.[8]

III.

The holding of the Circuit Court of Appeals for the Sixth Circuit in the instant case can, if the position of the appellants is correct as to questions I and II, can be upheld only upon the basis that the Chandler Act requires an additional assertion of rights where proceedings under Chapter X have preceded the bankruptcy. This is contrary to the prevailing law for the following reasons:

(a) The Chandler Act does not diminish the rights of a lien claimant.

(b) Participation in reorganization proceedings does not operate as a waiver of lien.

If the secured claims in this matter are conceded to be valid and proper, and the Courts will not confirm a sale which will yield to lienholders insufficient to equal the amount of their liens, we must conclude that it was the Court's intention to apply the proceeds other than in

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[6]Security-First National Bank vs. Rindge Land and Nav. Co. (C. C. A. 2), 85 F. (2nd) 557; 107 A. L. R. 1240; certiorari denied 299 U. S. 613.

[7]Duparquet Huot & Munuse Co. vs. Evans, 297 U. S. 216; 56 S. Ct. 412, 415; 80 L. Ed. 591.

[8]Matter of Avorn Dress Co. (C. C. A. 2) 79 F. (2nd) 337.

satisfaction of liens. The only remaining justification for such an act would be that the Chandler Act has changed the existing law so as to permit such an application, unless the claimant takes the further steps mentioned in the opinion of the lower court.

Chapter X of the Chandler Act does not diminish the rights of a lien claimant[9], except under special circumstances[10] which do not appear in this case. Participation in reorganization proceedings does not operate as a waiver of lien in cases under Section 77B of the Bankruptcy Act in force prior to the enactment of the Chandler Act.[11]

Additional authorities, patently contrary to the holding in the instant case appear in the appended brief.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari issue under the seal of this Court to review the order of the Circuit Court of Appeals for the Sixth Circuit in the above case and that said order be reversed.

Respectfully submitted,

DAVID CHARNESS,
Attorney for Petitioners.

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[9]Chapter X, Section 200, Section 238, Section 238 (3).

[10]Section 116 (2).

[11]Coursey, et al, vs. International Harvester Co., et al (C. C. A. 10) 109 F. (2nd) 774; Hoehn vs. McIntosh (C. C. A. 6) 110 F. (2nd) 199.

In the Supreme Court of the United States

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No.

NORTHWESTERN BREWERS SUPPLY COMPANY, and STURDY-BILT EQUIPMENT CORPORATION,

Petitioners,

vs.

WILLIAM J. SCHMIT, Trustee,

Respondent.

In the Matter of DELTA BREWING COMPANY, a Corporation,

Bankrupt.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered an opinion not reported (R. 110).

The opinion of the Circuit Court of Appeals is short and unsupported by statute or decisions and not reported (R. 135).

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on January 14, 1941. Motion for rehearing was denied on February 12, 1941. Stay of mandate was granted on March 4, 1941.

The jurisdiction of this Court is invoked under the Bankruptcy Act, Sec 24c, 11 U.S.C.A. 47(c), and the Judicial Code, Sec. 240, 28 U.S.C.A. 347(a).

STATEMENT OF FACTS

The facts have been stated in the petition.

SPECIFICATIONS OF ERRORS

It is submitted that the Court below erred:

1. In ruling that a petition for reclamation or a claim for priority as secured creditors was necessary prior to a sale free and clear, to preserve lienors' rights.

2. In affirming the order of the lower court confirming the sale free and clear of encumbrances.

SUMMARY OF ARGUMENT

The Court below refused to disturb an order confirming a Trustee's sale of property free and clear from liens having a value of approximately more than double the sale price. This was done upon the theory that the appellants as secured creditors should have filed, in addition to the secured claims actually filed by them, "claims for priority as secured creditors" or reclamation proceedings. This is contrary to the prevailing authorities upon the question of lien rights under the Chandler Act (p. 16). The filing of a claim in bankruptcy is not essential to preserve the lien (p. 16). The Trustee takes property of bankrupt subject to all valid liens as of the date of bankruptcy (p. 17). As to conditional sales contract, trustee takes no title (p. 17). The priority provisions of the bankruptcy act have no effect upon secured claims (p. 17). The claims of the appellants were recog-

nized as valid liens and properly filed in the proceedings. Bankruptcy Act does not require additional procedure. (p. 18).

Equity will not order a sale by a Trustee in Bankruptcy free and clear of liens if it appears that the purchase price is less than the amount of the liens (p. 18). Sale must not injure lienholders and burden is on trustee to prove that property will bring more than liens (p. 19).

Lienholders are not chargeable with the expense of administration unless they consent, the administration is for their benefit, or they apply for the administration by the Court (p. 21). The lack of other assets to pay administration expenses has no bearing upon Court's decision where insufficient is realized by sale free and clear to meet liens (p. 21). This is also the rule as to expenses of operating in receivership (p. 22).

Sale of lienors' security for less than amount to pay encumbrances results in a violation of the Fifth and Fourteenth Amendments to the Constitution. (p. 23). Right to retain a lien until payment is substantial property right (p. 23). Bankruptcy does not impair liens (p. 23). Confusion in distribution would result if rule were otherwise (p. 24).

Participation in reorganization proceedings does not operate as a waiver of lien (p. 26). Intention to waive or estoppel must exist (p. 26). Permitting trustee to remain in possession does not waive claim to security (p. 27). Under Section 77B of the Bankruptcy Act before Chandler Act, estoppel analyzed in relation to cooperation with reorganization trustee (p. 27).

Conclusion (p. 28).

ARGUMENT

The Decision of the Lower Court is Contrary to the Generally Accepted and Prevailing Authorities Upon Question of Lien Rights Under the Bankruptcy Act.

I.

(a) Reclamation or claim for priority as secured creditor is not required to preserve a valid lien.

The decisions of this Court and Circuit Courts of Appeal have uniformly held that a secured creditor need not go into the bankruptcy court, but need only rely on his security if he is not interested in obtaining access to a surplus to meet a deficiency. 6 A.J. Sec. 122, p. 584. He holds the legal title either by retention under conditional sales, or by transfer as security. He may nevertheless elect to file so long as he names himself as a secured creditor or plainly evinces his intention to participate as a secured creditor to enable him to share in a surplus to meet a deficiency. *2 Remington,* 4th Ed. Sec. 910; *Elston vs. Rusch,* 250 Mich. 221, 229 N.W. 503.

Failure of the pledgee to appear and prove his claim in the bankruptcy courts forfeits only his right to participate in the distribution of the bankrupt's estate ordered by the court. *Yeatman vs. New Orleans Sav. Inst.,* 95 U.S. 764, 24 L.Ed. 589. The filing of a claim in bankruptcy is not essential to preserve the lien. In re *Joaquin Valley Packing Co.,* 295 F. 311; Certiorari denied 44; 265 U.S. 583; *Courtney vs. Fidelity Trust Co.* (C.C.A. 6) 219 F. 57; In re *Cherokee Public Service Co.,* 94 F. (2d) 53; 33 A.B.R. 400; *Thompson-Ritchie Grocery Co. vs. Cary,* 135 So. 707, 17 La. App. 270; 20 A.B.R. (N. S.) 145; *Lester vs. So Surety Co.,* 168 Ga. 307, 295 S.W.

717; In re *North Star Ice & Coal Co.,* 252 F. 301. The receiver and trustee take and hold title subject to all valid liens. And as to conditional sales contracts, the trustee takes no title. In re *Burgemeister Brewing Co.* 84 F. (2d) 388 (C.C.A. 7); In re *Lake's Laundry Inc.* 79 (2d) 326 (C.C.A. 6). Certiorari denied 296 U.S. 622, 56 S. Ct. 144, 80 L. Ed. 442; In re *Ames,* 289 F. 208 (C.C.A. 6); In re *Tyrell,* 285 F. 69 (D.C. E.D., Mich.); In re *Erco Amusement Co.,* 39 F. (2d) 613; *Smith vs. Carukin,* 259 F. 51; 44 A.B.R. 278; In re *Voight-Pros't Brewing Co.* (C.C.A. 6) 115 F. (2d) 733.

The Trustee's rights are determined as of date of filing of the petition in bankruptcy or plan of reorganization. Section 70 (a), Title 11 U.S.C.A. Sec. 110.

A careful distinction is made in the prevailing decisions between claims for priority and secured claims. Lien creditors are not affected by priority provisions of the Bankruptcy Act. (Bankruptcy Act § 64). *The City of Dallas, et al vs. Ryan, et al,* 22 A. B. R. (N.S.) 378, at 381 (C.C.A. 5), 62 F. (2d) 959; Certiorari denied 289 U. S. 742. There has been no change in the law respecting prior and secured claims.

Secured creditor has alternative of foreclosing, and filing claim for its balance or applying to bankruptcy court for method of liquidation. (Bankruptcy Act § 57e). Failing such information the court could direct proof before the referee as to value. (Bankruptcy Act § 57h).

In re Soltman, 238 F. 241, 38 A.B.R. 270.

Claims were filed in the instant case as secured by both appellants, attaching thereto their respective conditional sales contract and chattel mortgage, each containing the same language (R. 5 and 7) as follows:

> "Claimant reserves all rights and security afforded by said contract or otherwise, and does not by filing this claim waive the same."

In each instance the claim is described as a "secured claim" (paragraph 6, R. 5 and 7). The claims were recognized as such throughout the proceedings. (R. 29, 31, 34, 36, 38 and 89). It has not been argued below that appellants had elected to come in as general creditors and waive their security.

A secured creditor, as defined in the Bankruptcy Act in Section 1 (28), may have a claim allowed for the surplus over the value of the security as provided in Section 57 (e) of the Act. Section 63, relating to debts which may be proved, does not refer to secured creditors who consequently do not have provable claims. The decision of the Circuit Court of Appeals would necessitate the filing of a claim for priority, but Section 64 of the Bankruptcy Act dealing with priorities is not concerned with secured creditors. Prior to the enactment of the Chandler Act it was held that sections respecting the filing of claims referred to unsecured claims and Section 67 (d) of the act expressly excepted liens given or accepted in good faith. Section 67 (d) is amended by the Chandler Act, but this does not appear to have altered the status of a creditor holding valid security, nor do the rights of bona fide secured creditors appear to be diminished elsewhere in the act. cf. In re *Voight-Pros't Brewing Co.* (C.C.A. 6) (1940) 115 F. (2d) 773.

II.

(a) Equity Will Not Order a Sale Free and Clear of Liens If It Appears That the Purchase Price is Insufficient to Pay Off the Lien Claimants.

The ultimate private sale was in two parts. $3,800.00 for the unencumbered property (excepting a $171.00 chattel mortgage) and $23,000.00 for the encumbered

property (R. 69-71), there being due on the encumbered property as follows:

Real estate taxes (R. 44 and 90)	$ 8,812.40
Real estate mortgage, including interest (R. 22)	50,531.00
Northwestern Brewers Supply Co. with interest from July 9, 1938, (R. 4)	1,400.00
Sturdy-Bilt Equipment Corporation, with interest (R. 6)	2,018.00
Klein Filter & Mfg. Company (R. 29), probably in excess of	1,000.00
	$63,261.40

The record is absolutely barren of any request by the lienholders to the bankruptcy court for the administration of their securities. On the contrary, they objected from the start, unless it could be shown that the Trustee could reasonably obtain more under the liens. Their objections continued (R. 33, 50, 51, and 55) and were not abandoned.

The lower court, itself, in an opinion apparently inconsistent with the instant case, in the recent case of *Hoehn, et al vs. McIntosh, Trustee* (C.C.A. 6th, March 15, 1940), 42 Am. B. R. (N.S.) 475 at 482, 110 F. (2d) 199 at 202 said:

> "(2) the power will not be exercised unless it is made to appear that there is a fair prospect of the property being sold for substantially more than enough to discharge the lien or liens upon it. In re Franklin Brewing Company (C.C.A., 2nd Cir.), 41 Am. B. R. 51, 249 Fed. 333; Ray vs. Norseworthy, 23 Wall. 128, 9 U. S. 128, 137, 23 L. Ed. 116. The court must be satisfied that a sale will be to the interest of the general creditors and not injure the lien-

holders and *where a trustee files a petition to sell real estate free of liens and the lienholders join issue with him, the burden is on him to make it appear that there is a reasonable probability the property will bring more than the amount of the liens.*" (Italics ours)

To the same effect, *Tawney vs. Clemson, Trustee* (C.C.A. 4th), 30 Am. B. R. (N.S.) 249, 81 F. (2d) 300 at 304, wherein it was said:

"The power of course should not be exercised unless it is reasonably clear that the property is worth more than the encumbrances and expenses of sale."

See *Seaboard National Bank vs. Rogers Milk Products Co., Inc., et al* (C.C.A. 2d), 21 F. (2d) 414;

Re Hagin (D.C.) 21 F. (2d) 439;

Hardrostle vs. National Clothing Co., 191 S. W. 524.

In *Louisville Joint Stock Land Bank vs. Radford,* 295 U. S. 555 at 583, 79 L. Ed. 1593 at 1601, 97 A. L. R. 1106 at 1113, it is said:

"But there had been no suggestion that a sale could be made to the prejudice of the lienor, in the interest of either the debtor or of other creditors. By the settled practice, a sale free of liens will not be ordered by the bankrupt court if it appears that the amount of the encumbrance exceeds the value of the property."

See also *Re Feeney Tool Co.,* 300 F. 379, 4 Am. B. R. (N.S. 827). And it was held that the chattel mortgagee should be left free to pursue his remedy upon the chattel mortgage in the state court.

To the same effect, *Re Fayetteville Wagon-Wood and Lumber Co.,* 197 F. 180, 28 Am. B. R. 307; 6 Am. Jur. 757 and 758.

Lienholders are not chargeable even with costs of sale or general administration unless (a) They expressly consent; (b) It be wholly to their benefit; (c) They call upon the instrumentality of the court to administer for them.

The appellant lienholders neither consented to the sale nor was the sale to their benefit, because it took away their property and prevented them from pursuing their own remedies separately, nor did they anywhere petition or call on the court to administer their security.

It was said in *Seaboard National Bank vs. Rogers Milk Products Co., Inc., et al* (C.C.A. 2d), 21 F. (2d) 414 at 417:

> "There is doubt whether even the expenses of the sale should be charged to the lienor if he did not consent to the sale. Aetna Life Ins. Co. vs. Leonard, supra; In re Vulcan Foundry, etc., Co., 180 F. 671 (C.C.A. 3). Nor is it material that no general estate remains to compensate the receiver or the trustee in bankruptcy, or their attorneys, where the fund realized is less than the amount of the valid incumbrance. In re Williams, supra; Smith vs. Township of Au. Gres, 150 F. 257, 9 L. R. A. (N.S.) (C.C.A. 6); In re Cutler & John (D.C.), 228 F. 771 (E.D.N.C.). This is no hardship, for the sale should not have been asked unless there was a reasonable expectation that the general estate would be benefited."

The liens must be paid out first. The lienholders cannot be charged with expenses without their request or consent. *Annotations,* 75 L. Ed. 658. See *Byrer vs. Bushong* (C.C.A. 4th), 42 Am. B. R. (N.S.) 14, 108 F. (2d) 594. In *re Rubin L. Meyers, supra* (C.C.A. 2d), 24 F. (2d) 349, 11 Am. B. R. (N.S.) 568. *Tawney vs. Clemson, Trustee* (C.C.A. 4th), 81 F. (2d) 300.

It was said in *Bruce Sewing Machine Company,* District Ct. (S.D. Ill.), 2 F. Supp. 330, 22 Am. B.R. (N. S.) 446 at 451:

> "Under these circumstances the only deductions that can be made from the purchase price are the costs which would have accrued in foreclosing the mortgage in the Circuit Court of Sangamon County. Had the bank abandoned the remedy which it had selected, and sought the foreclosure of its mortgage through the proceedings in bankruptcy to sell the mortgaged property, free and clear of all encumbrances, or if the proceeding was entirely for the benefit of the bank, then a different situation might have been created. But, where the holder of a valid lien upon real estate owned by the bankrupt is forced to permit his security to be sold, free and clear of all incumbrances, the fund so created may not be diminished by the costs of administration in a bankruptcy proceeding. To hold otherwise would nullify the security granted by Congress in the enactment of the Bankruptcy Act, to the holders of valid liens upon the property of persons who became insolvent."

This also has been the holding as to expenses of operating the business in receivership although lienor may bear the reasonable expense of preserving the pledged property. *Miners Savings Bank of Pittston, Pa., et al vs. P. F. Joyce, et al, Trustee* (C.C.A. 3), 37 Am. B.R. (N.S.) 400, 97 F. (2d) 973; *Byrer vs. Bushong, supra* (C.C.A. 4), 42 Am. B.R. (N.S.) 14, 108 F. (2d) 594.

(b) The Procedure Adopted by the Trustee Here Would Result in a Violation of the Constitutional Protection Afforded by the Fifth and Fourteenth Amendments, in Abrogating Vested Contract Rights, Result in a Deprivation of the Property of the Appellants, Injustice, and a Vortex of Confused Questions Relating to Distribution.

Distribution of the proceeds of this sale is practically impossible because after deducting the expenses there will be left little or nothing. An affirmance here will produce added litigation over a fund admittedly insufficient even though creditors prevail in their effort to surcharge the trustees' account.

This sale results in a deprivation of property contrary to the Fifth and Fourteenth Amendments to the U. S. Constitution.

> "It is a shocking result, and such as justly brings receiverships into disrepute in the popular mind." *Seaboard National Bank vs. Rogers Milk Products Co. et al* (C.C.A. 2), 21 F. (2d) 414, 416.
>
> "The right to retain a lien until the debt secured thereby is paid is a substantial property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendment to the Constitution. Louisville Joint State Bank vs. Redford, 295 U.S. 555, 594, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, 28 A.B.R. (N.S.) 397 * * * " *Security-First Nat. Bank vs. Rindge Land & Nav. Co.* (C. C. A. 2) 85 F. 2d 557, 107 A.L.R. 1240, 32 A.B.R. (N.S.) 97, writ of certiorari denied in 299 U.S. 613.

Liens may not be impaired in bankruptcy so as to abrogate existing contractual rights. *Duparquet Huot & Monuse Co. vs. Evans,* 56 S. Ct. 412, at 415, 297 U.S. 216, 80 L. Ed. 591 per Justice Cardozo:

> " * * * it is also common learning that not even a trustee in bankruptcy may override a valid mortgage

lien [Seven cases cited] * * * Section 77B (11 U.S. C.A. 207) does not make these precedents inapposite * * *. Only by excluding a receiver in foreclosure from the scope of subdivision (i) [supplanting other possession] can we avoid anomalous encroachments upon vested rights and interests" (Brackets by briefer).

cf. *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (C.C.A. 7) 100 F. (2d) 588.

These fundamental principles are assuredly equally applicable whether the security be realty or personalty. By confirmation of the proposed sale the court would render ineffectual the well established right to secure an obligation as against all other claimants.

We have attempted to approach this matter from the standpoint of showing the injustice created by the affirmance of the order of the lower court confirming the sale. We are constrained however to point out to the court the vortex of legal questions that arise upon such confirmation. In the event this Court denies the writ requested, the difficulty of determination of apportionment of the proceeds of the sale arises. It should be borne in mind that a trustee's liability may be established if this sale is confirmed for incurring expenses unauthorized in law and unwarranted by a situation apparent to him, but which could not have been apparent to the claimants. Unauthorized loans or disbursements cannot be given priority as administration expenses. *Matter of Avorn Dress Co.* (C.C.A. 2), 79 F. (2d) 337, 29 A.B.R. (N. S.) 497.

Confirmation of the sale leaves the question of distribution in utter confusion. Would the property be subjected to the cost of maintenance in reorganization where it was recognized as a proper secured claim? Or the loss by

trustee's operation in that proceeding? Or for attorney and trustee's fees in that proceeding? Or for wage claims due from the trustee?

Should claimants' property be applied to the cost of maintenance in the bankruptcy proper, to attorneys' and trustees' fees there? or to the cost of a sale which would in effect confiscate the property?

It would certainly create the anomaly and foster the encroachments decried by the Supreme Court in the *Duparquet* case, supra, and *Miners' Savings Bank Pittston, Pa. vs. Joyce,* 97 F. (2d) 973.

That lienors do not come within distribution under provisions of Section 64 of the Bankruptcy Act is also plain from the decisions that they do not have to contribute to the costs of the bankruptcy, which are the first items to be paid on a distribution under Section 64, unless the lienor has invoked the aid of the court, nor then except as to direct and necessary expense of preserving and realizing on his security. *Gugel vs. New Orleans Bank* (C.C.A. 5th), 39 A.B.R. 160, 239 F. 676; *In re Williams* (C.C.A. 9th), 19 A.B.R. 389, 156 F. 934; *In re Cutler and John* (D.C.), 36 A.B.R. 420, 228 F. 771. See also *In re Vulcan Foundry, etc.* (C.C.A. Pa.), 180 F. 671, 24 A.B.R. 825, and *In re Harralson* (C.C.A. 8th), 179 F. 490, 29 L.R.A. (N.S.) 737, 24 A.B.R. 715; *Robertson vs. Goree* (C.C.A. 5th), 29 F. (2d) 261, 13 A.B.R. (N.S.) 64. *Louisville Joint Stock Land Bank vs. Radford,* 295 U.S. 555, 583, 79 L. Ed. 1593, 1601, 97 A.L.R. 1106, 1113.

III.

Participation in Reorganization Proceedings Does Not Operate as a Waiver of Lien or an Estoppel.

The only other conclusion that might be drawn from the Court's Order of Affirmance is that there is present either a waiver or an estoppel.

There is no waiver because as shown above, it was not necessary to come into court with a claim.

Ward vs. First National Bank (C.C.A. 6), 202 F. 612, 29 A.B.R. 312;

In re Hagin, 21 F. (2d) 434, 10 A.B.R. (N.S.) 523.

In *Maxwell vs. McDaniels,* 195 F. 426, 428, 429, it was said:

> "Acts relied on as a waiver or a release must either be done with intent to waive or release or else they must be such as might reasonably have led, and in point of fact did lead, other persons to act to their hurt upon the assumption that the waiver or release had been made."

The reorganization receiver and trustee in bankruptcy both knew with absolute certainty that no waiver or release existed and they incurred no deficit because of the appellants. The change of position if it can be called that, resulting from the ill-advised running the business at a loss during reorganization, was certainly not the result of appellants' acts, or failure to reclaim.

Numerous cases can be supplied as authority that permitting the trustee to remain in possession does not waive the lien claimed as security. Among these are:

In re Endlar, 192 F. 762, 113 C.C.A. 48;

Gadd vs. Dawson, 291 F. 327;

Smith vs. Township of Au Gres, Mich., 150 F. 257, 80 C.C.A. 145, 9 L.R.A. (N.S.) 876;

In re Collinwood Motor Sales, 72 F. (2d) 137;

Hamilton Nat. Bank vs. McCollum, 58 F. (2d) 912;

In re Aldoy Motor Co., 50 F. (2d) 221, and certiorari denied;

Scott vs. Hamilton Nat. Bank, 53 S. Ct. 19, 287 U. S. 619, 77 L. Ed. 537.

This remained the rule under § 77B where the receiver took possession. *Duparquet Huot & Monuse Co. v. Evans,* 56 S. Ct. 412, 297 U. S. 216, 80 L. Ed. 591. A well reasoned case from the Tenth Circuit which is contrary in effect to the decision of the lower court is the case of *Coursey vs. International Harvester Co.,* 109 F. (2d) 774, which subordinated expenses to liens in reorganization and said:

"As to the question of waiver of their lien, an estoppel is an indispensable element of a waiver. Lewin v. Telluride Iron Works Co. et al. (C.C.A., 8th Cir.), 47 Am. B. R. 22, 272 Fed. 590, and authorities therein cited.

"Elements of an estoppel are (1) ignorance on part of the parties who invoke the estoppel or him from whom such parties derive such claim, (2) a representation by word or act by party estopped which has misled, and (3) an innocent and detrimental change of the party asserting the estoppel in reliance upon the representation. Northern Assurance Co. v. Grand View Bldg. Co. (C. C. A., 8th Cir.), 101 Fed. 77.

"Not existing in this case are (1) ignorance of the parties who invoke the estoppel or him from which such partes derive such claim, (2) a representation by word or act by party alleged to be estopped which has misled, and (3) an innocent and detrimental

change on part of the party asserting the estoppel in reliance upon the representation."

In this connection it should again be noted that there was no compliance with the provisions of Chapter X, § 116(2) permitting receiver or trustee to issue certificates having priority over lien claims. Since notice and order under that section do not exist the effect of the decision of the Circuit Court of Appeal in the instant case is to accomplish a similar result without statutory authority. Under the decisions of this court and of other circuits this should not be done.

CONCLUSION

The Circuit Court of Appeals has decided an important question of law, concerning the rights of secured creditors in bankruptcy, in conflict with the decisions of other circuit courts of appeal and of this Court, and in probable conflict with its own decisions.

It is respectfully submitted that this Court should grant a writ of certiorari for the reason that the order of the Circuit Court of Appeals.

(a) Is contrary to the established law as determined in this Court and other Circuit Courts of Appeals as to secured claims in bankruptcy; and

(b) Is contrary to the decisions of this Court and other Circuit Courts of Appeals relative to sales by Trustees in Bankruptcy of property subject to valid liens; and

(c) That, if said decision has been reached by reason of Chapter X of the Chandler Act, it resolves an unsettled question contrary to the de-

cisions of parallel courts prior to passage of that amendment to the bankruptcy act.

The case concerns a matter of everyday business life that should not be left in doubt.

Respectfully submitted,

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OTHER AUTHORITIES CITED:

Remington on Bankruptcy, Paragraphs 2583, 2602-2604.

IN THE

Supreme Court of the United States

In the Matter of
DELTA BREWING COMPANY,
a Corporation,

Debtor.

NORTHWESTERN BREWERS SUPPLY COMPANY and STURDY-BILT EQUIPMENT CORPORATION,
Creditors and Appellants,

vs.

WILLIAM J. SCHMIT,

Trustee and Appellee.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF MATTER INVOLVED

(Figures in parentheses refer to pages of the printed record, except as the context clearly indicates otherwise.)

Petitioner's statement needs to be supplemented. The bids for all of the unencumbered property in the estate in parcel amounted to $2,925.00. See Parcels 6, 8, 19, and 20 (R. 45, 46, 48, 49). All of the property in the estate offered for sale subject to liens and encumbrances brought a bid of only $3,550.00. See Parcel 23 (R. 49). The Referee sold the property free and clear of liens and encumbrances, because he had to do that in order to

secure sufficient money to pay administration expenses properly chargeable to the encumbered property (R. 92, 94, 107, 108). The administration expenses incurred under Chapter 10 of the Chandler Act are about as follows (R. 93):

Unpaid reorganization trustee's notes	$5,000.00
Unpaid reorganization trustee's expenses	1,578.66
Fees of reorganization trustee	2,000.00
Expenses of attorneys for reorganization trustee	229.02
Fees of reorganization Referee in Bankruptcy	532.00
Expenses of attorney for reorganization trustee	350.00
Services of attorneys for the bankrupt in reorganization proceedings—228¾ hours	750.00
Services of attorney for the reorganization trustee	750.00
Total expenses incurred under reorganization proceedings	$11,189.68

The last two items were not specified in terms of money in the record (R. 93), but the items are mentioned, and the figures we have used are our estimate of what might be allowed by the Referee.

In addition to these items there must be considered the expenses incurred in the bankruptcy proceedings pertaining to the care and sale of the property which we estimate will be not less than $3,000.00. The petitioner shows a total estimated unpaid administration expense of $20,693.28 (Petition, page 3). Our estimate is under this figure but it obviously could not be paid with only $3,550.00,—the highest bid for all of the property subject to liens and encumbrances. At private sale the trustee sold the unencumbered property for $3,800.00 (R. 69, 70).

JURISDICTION:

We deny that the Court does have jurisdiction because there is no conflict in the Federal decisions touching upon the question involved.

QUESTIONS PRESENTED:

We submit that the questions stated by the petitioner are not in point, and that the real question involved is as follows:

> "After a Court has authorized the expenditure of money for the purpose of preserving the value of encumbered property in regular proceedings under Chapter 10 of the Chandler Act, after due notice to, and without objection from a secured creditor, can that creditor prevent the Court from selling that property for the purpose of paying the proper proportion of money spent by the Court upon that property for its preservation."

REASONS RELIED ON FOR ALLOWANCE OF WRIT:

Petitioners have cited no case where the facts are similar to the case at bar. They have called our attention to no decisions applicable to the facts presented in the case at bar nor have they shown wherein the decision in the Court below is in conflict with any decision of this Court or of any decision of any other Circuit Court of Appeals where similar facts are involved.

We have examined the cases cited by petitioner, but do not find that any of them present facts similar to the facts presented in the case at bar. In the case at bar petitioners filed their claims asking for payment of the balance due them under their respective contracts with the bankrupt. They did not ask to reclaim their property, nor did they object to the proceedings under Chapter 10 of the Chandler Act (R. 4, 7). The proceedings under Chapter 10 of the Chandler Act were for the benefit of the secured creditors as well as the unsecured creditors. The secured creditors hoped by the proceedings to get their money rather than run the risk of a loss by repossessing their property. They took a chance on the reorganization proceedings, and after the proceedings failed they, for the first time, came into Court and objected to paying their share of expenses which the Court incurred for their benefit as well as for the benefit of the unsecured creditors. In filing their claims they stated that they did not thereby waive their security in their property. They did, however, leave their property in the custody of the Court, apparently hoping that the Court would find a way to pay their claims in full. They made no objection to the appointment of the reorganization trustee nor to the order authorizing him to conduct the business of the bankrupt to keep the business operating as a going concern. It is a matter of common knowledge that such

operation involves the expenditure of money. The Court in good faith authorized the trustee to borrow money to operate the business and the trustee did this for a period of about four months, (R. 124-16). Had it not been for the losses sustained by the reorganization trustee, and the administrative expenses incurred in those proceedings, the Referee could have sold sufficient unencumbered property to pay the general administrative expenses in the bankruptcy proceedings. (R. 107).

ARGUMENT

I.

In Remington on Bankruptcy, paragraph 2583, the general rule is stated that the Bankruptcy Court will not order a sale free from liens unless there is reasonable prospect that a surplus will be left for general creditors; however, in that same paragraph the following statement is made:

> "When lien holders do not object, and expressly or impliedly consent to the expenditure of money by the Trustee in Bankruptcy, for the maintenance of the mortgaged property, an exception to the general rule prevails, and the expenses thus incurred must be paid by the lien holders out of the fund, even though the property does not sell for enough to pay the liens." Citing Robinson vs. Dickey, 36 Fed. (2d) 147.

The case which perhaps is most in point and parallels our own to a greater extent than any other is that of Virginia Securities Corporation vs. Patrick Orchards, 20 Fed. (2d) 78. In this case a large apple orchard was composed of several parcels of land and owned by one corporation. Among the liabilities was an indebtedness of $110,000 secured by a first deed of trust on four of the orchards. There were vendor's lien notes outstanding on the other two orchards aggregating approximately $13,500.00 and there was a later deed of trust covering all six orchards, securing the Appellant Jennings in the sum of approximately $23,600. There were also creditors holding bonds of the company in a large amount and general creditors holding claims of approximately $15,000. The appraisers estimated the value of the real estate at approximately $500,000 and the personal estate at approximately $4,000. The property was immediately put up for sale in September and the best bid obtainable was $132,000. The unsecured creditors objected to this amount

as being insufficient. Because it was late in the autumn it was thought wise to hold the sale over until the spring of the year and to protect and preserve the trees in the meantime. This required the expenditure of considerable money and the Court authorized the trustees to borrow sufficient funds to do this. On April 6, of the following year, it was again offered for sale, and brought approximately $162,000. This sale was confirmed by order of the Court. It was then that the Appellant Jennings discovered that after prior lien holders were paid he would receive little or nothing after the administration costs and expenses were deducted. The Court found that in each instance in which expense was incurred the reasons for the same were fully set out in the trustee's petition, were properly submitted to and acquiesced in by the creditors. The Court said:

> "The several steps thereafter taken to this end, as well as the expenditure of money in the upkeep and preservation of the properties pending sale, were matters as to which all had full knowledge, and as to which none protested until the second sale of the property, and the allocation of the purchase price to the several liens according to their priorities developed the fact that Appellant Jennings, as holder of the second mortgage note, would receive nothing on account of his debt. We think not only that this protest came too late, but in the circumstances, it is wholly without merit. The general rule with regard to the expenses of foreclosure and administration in bankruptcy is to pay such expenses out of the general estate, if there is one, rather than out of the fund derived from the sale of mortgage or lien property; but where there is no general fund, as was the case here, or where the expense has been incurred wholly for the benefit and the advantage of the mortgaged property, as also is the case here, such expenditure is properly chargeable against it, and particularly is this true where the mortgage or lien creditor volun-

> tarily chooses to avail himself of the administrative functions of the Court in bankruptcy to realize on his security. * * *
>
> "Here, as has already been said, practically the whole estate in process of administration was real estate, on all of which there were different classes of liens, but as to which there was a reasonable expectation that the proceeds of sale would pay the same in full and leave a substantial equity. To determine this question it was necessary that the property should be sold and pending its sale that it should be preserved. To accomplish this the lienholders had the benefit of the services of the trustee and of the appellant. Proper orders looking to the sale of the property had to be drawn and presented, and the property in the meantime had to be maintained in a high state of cultivation, in order to preserve it from serious deterioration and loss. All of these things were for the benefit primarily of the lienholders, who had sought and invoked the aid of the Court in the collection of their debts. By coming into bankruptcy, they lost none of their rights; but when a lien creditor avails himself of the instrumentalities of the Court in the enforcement of the lien, then the proceeds of the property upon which the lien exists may be charged with the expenses necessary in the enforcement of the lien as well as in the preservation of the property."

In comparing the above case with the instant one, we have the fact that there was a large amount of real estate, all of which was encumbered with a very small amount of personal property, which was unencumbered. The value of this personal property was in no way sufficient to pay administration costs. The period during which the apple orchard was entrusted to the care of the trustee and in which he borrowed and spent a considerable amount of money to care for and keep the trees in a healthy condition may be likened to the period of reorganization under Chapter X in the instant case where the Trustee

borrowed money, not only to protect the property, but to put it on a paying basis. We have the same acquiescence on the part of our Appellants to these proceedings as occurred in the above case until they discovered as did the Appellants above that they would have to share their burden of the expenses of administration during this period and that there would be little or nothing left for them.

In the orchard case the property was appraised at approximately $500,000 and was sold for $162,000—about one-third of its appraised value. In the instant case the property was appraised at approximately $66,000 (R. 72) and the best price obtainable was $26,800, less than one-half of its appraised value.

In Adair vs. Bank of America, 303 U. S. 350, 58 S. Ct. 594, the facts are similar to the apple orchard case quoted above. A vineyard is involved and the mortgagee attempted to escape payments of his share for harvesting the crop, preserving the vineyard and cultivating the crop of the following year. The Court said:

> "In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides * * * for the exercise by the Court of 'such control over the property of the farmer as the Court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act." * * *
>
> "The Court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own expense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had

come into Court seeking relief under Section 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the Court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the Court.

"Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth and the cost of protecting a fund in Court is everywhere recognized as a dominant charge on that fund. * * * The rule applies even in ordinary bankruptcy proceedings since the secured creditor benefits from the disbursement."

II.

In view of the above quoted authorities it seems unnecessary to comment further upon petitioner's brief. The trustee does not deny the validity of petitioner's liens but the trustee takes the position that his claim for payment of the pro-rata share of administrative expenses constitutes a prior claim over that of petitioner's. The effort made by the reorganization trustee under Chapter 10 of the Chandler Act was an attempt to preserve the value of all the property under the custody of the Court and the payment therefore constitutes a dominant charge against that property. Adair vs. Bank of America, supra.

The trustee concedes the general rule to be that the Bankruptcy Court will not sell encumbered property unless a showing is made that sufficient money will be obtained to pay off the encumbrance but, as we have shown, a different rule obtains where the lien claimant has impliedly invoked the assistance of the Court to realize upon his claim. The fact that all of the encumbered property was appraised separately, piece by piece, will enable the trustee to apportion the proceeds of the sale to the various lien claimants (R. 72, 73, 74). See Remington on Bankruptcy, paragraph 2602-2604.

CONCLUSION

We, therefore, maintain:

1. That there is no conflict in the Federal decisions pertaining to the subject matter presented in this case.

2. That the decisions of the Courts below are well founded upon the general principal that property placed in the charge of a Court is properly chargeable with the maintenance and preservation thereof.

3. If the petitioners are right, then no trustee could feel protected by incurring expense under Court order for the preservation of property over which the Court has jurisdiction.

We respectfully submit that the petition be denied.

Dated this 15th day of April, A.D. 1941.

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